[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
June 4, 1938.

YEW TECK SENG OF CHOP SENG JOO, JEMENTAH, SEGAMAT.....Plaintiff
vs.
TEO TONG KAH alias TEO TONG NGAH AND ANOR. .....Defendants

[MUAR CIVIL SUIT No. 1 of 1938]

Res Judicata—F.M.S. Civil Procedure Code, Section 6—Effect of earlier decision in Lower Court on issue beyond its jurisdiction.

In an action to set aside an agreement between the plaintiff and the two defendants who were formerly in partnership with him, the defendants raised the preliminary objection that the issue was *res judicata* because in a lower court the defendants had recovered against the plaintiff a judgment which involved a decision that the agreement was enforceable.

Held, following the observations of the Privy Council in *Gokul Mandar* v. *Pudmanund*, (1902) I.L.R. 29 Calcutta p. 707, "that a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised."

Shibo Raut v. *Baban Raut*, (1908) I.L.R. 35 Calcutta p. 353, also applied. *Pattrachariar* v. *Alamelumangai Ammal*, (1927) A.I.R. Madras p. 273, not followed.

PRELIMINARY OBJECTION.

Salt for Plaintiff.
Mitra for Defendants.

MILLS, J.—In this suit the plaintiff prays the Court to set aside an agreement made between himself and his two former partners.

Under this agreement the plaintiff promised to pay to each of his former partners the sum of $374.97.

And each partner has obtained judgment for this sum against the plaintiff in the Court of the Magistrate at Segamat.

In the present suit the defendants raised the preliminary objection that the Magistrate has already decided that the agreement is enforceable, and that the issue, whether or not the agreement is enforceable, is *res judicata* within the scope of Section 6 of the Civil Procedure Code.

The plaintiff on the other hand contends that the issue is not *res judicata* because the Magistrate's Court was not competent to try the present suit. I reserved my decision in order to study the Indian cases.

The question does not seem to have been fully treated by the Indian commentators for I find that in the treatises of Sarkar and Mulla certain cases relied upon by the one author are not quoted by the other, and *vice versa*.

For decisions bearing upon this question, it is not necessary to go back further than the case of *Gokul Mandar* v. *Pudmanund*, (1902) I.L.R. 29 Calcutta. p. 707 in which the Privy Council observed regarding the corresponding section of the Indian Civil Procedure Code "a decree in a previous suit cannot be pleaded as *res judicata* in a subsequent suit, unless the Judge, by whom it was made, had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subsequently raised."

Their Lordships further observed that "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." The scope of these observations has been differently interpreted in Calcutta and in Madras.

In the Calcutta case of *Shibo Raut* v. *Baban Raut* (1908), I.L.R. 35 Calcutta p. 353, decided by two judges, the first suit had to do with only a part of the property which was the subject-matter of the second, so that the Court which tried the first was not competent to try the second: it was held that no part of the claim was barred, since the first Court had no jurisdiction to try the second suit.

On the other hand, in the case of *Pattrachariar* v. *Alamelumangai Ammal* (1927 A.I.R. Madras, p. 273), decided by one judge, the judge adopted the view that, although taking all causes of action together, the second suit may be said to be outside the jurisdiction of the original Court, still if the specific question be within the jurisdiction of the original Court, it is no answer to say that the whole suit was beyond the jurisdiction.

I have to choose between these opposite views. In my opinion the former view is correct. Indeed I can see no essential difference between the expressions "specific question" and "particular matter," and, that being so, it appears to me that the latter view is contrary to the observations of the Privy Council and the language of the Code.

I am aware that the former view admits the possibility that a Magistrate may decide an issue in one way and the Judge may decide it in the opposite way; but such a possibility must have been apparent to the framers of the Code, which has been amended several times in India and in the Federated Malay States; and if this

view, consonant with the plain language of the Code, does not represent the intention of the Legislature, it would appear an easy task to achieve the appropriate amendment.

I decide the preliminary objection in favour of the plaintiff.

I also give leave to the plaintiff and defendants to amend their pleadings if they so desire: the amended plaint is to be filed within 3 weeks from the date when this judgment is read, and the amended defence within 3 weeks from the date when the amended plaint is filed.

Objection over-ruled.

[ORIGINAL CIVIL JURISDICTION]
MILLS, J.
March 25, 1939.

S. K. WONG & ORS. v. THE OVERSEA CHINESE THEATRES LTD.

[JOHORE BAHRU CIVIL SUIT No. 28 of 1938]

Landlord and Tenant—Tenant holding over after expiration of lease.

If a Lessee holds over after the expiration of his lease he is liable to pay damages for the use and occupation of the premises. In considering the value of the use and occupation, the nett annual value must be assessed on the principle that he who holds the premises without an express bargain agrees to pay whatever the jury may find the occupation to be worth. Mesne profits are defined in s. 2 of the F.M.S. Civil Procedure Code to include profits which a person in wrongful possession might with ordinary diligence have received from the property.

FURTHER CONSIDERATION OF ACTION.

John Laycock for plaintiffs.

M. C. Johannes and *M. Ismail* for defendants.

The facts and arguments appear sufficiently from the judgment.

Cur. Ad. Vult.

MILLS, J.—In this suit the plaintiffs claimed possession of certain land and premises, also double rent for holding over from 1st October, 1938, until delivery of possession or judgment.

On 15th February, 1939, I ordered the defendants to deliver possession on or before 15th March, 1939, and I reserved the question of double rent for further consideration. On the 22nd March, 1939, the plaintiffs obtained leave to amend their plaint by deleting the claim for double rent and substituting a claim "for damages for use and occupation and for holding over possession of the said and premises at the rate of $610 per month from the 1st day of October, 1938 until delivery of possession".

The hearing of the claim for damages took place on the 22nd March, 1939, and I was asked to put my decision in writing. I hold that the plaintiffs have the right to treat the defendants as tenants at sufferance for the period during which they hold after the expiration of the lease and to sue them for use and occupation in respect thereof. (*Leigh* v. *Dickenson*, 12 Q.B.D. at p.196).

I find that the lease expired on 30th September, 1938. In my opinion the plaintiffs were quite right to abandon their original claim for double rent: the law of Johore does not justify such a claim. It remains for the Court, sitting as a jury, to assess the damages for use and occupation.

The principle is laid down by Lord Denman C.J. in *The Mayor of Thetford* v. *C. D. Tyler* (115 English Reports, at p. 812)

> " But the case rests upon a principle resulting from the nature of an action for use and occupation, namely, that he who holds my premises without an express bargain agrees to pay what a jury may find the occupation to be worth. Where a party, having held for a term at a certain rent, continues to occupy after the expiration of his term, it is presumed, if there be no evidence to the contrary, that the holds at the former rent. But in the present case there is so clear an indication of an intent to alter the terms that that principle cannot apply".

The defendants had a lease of the land and premises for one year from the 1st October, 1937, at a rent of $200 a month. On the 4th June, 1938, one of the plaintiffs wrote to the defendants stating that if they wished to negotiate for the renewal of the lease for another year, the rent would be $1,500 a month.

On the 8th June, 1938, the defendants replied making a counter-offer of a rent of $425 a month.

I therefore find as a fact that there was a clear indication of an intent to alter the terms of the former lease. On or about 29th June, the plaintiffs invited tenders for a six-year lease of the land and premises: the highest tenderer offered $610 a month: the defendants also offered $610 a month. At the hearing of the issue as to damages, the defendants submitted two alternatives to the Court:—

I. " In considering the value of the use and occupation the net annual value must be taken" (*Clerk and Lindsell* on Torts, 8th edition, p. 329).
They called evidence to show that the net annual value of the land and premises in the valuation roll of the Johore Bahru Town Board is $2,400 in 1938 and $5,400 in 1939.
It was not shown, however, that the Assessment Committee knew of the offer of $610 a month.
In any case, I should find that the more accurate valuation was that